IN THE

Supreme Court of the United States

OCTOBER TERM, 1960

No. 242

THE GLIDDEN COMPANY, DURKEE FAMOUS FOODS DIVISION, A Foreign Corporation,
Petitioner,

against

OLGA ZDANOK, JOHN ZACHARCZYK, MARY A. HACKETT, QUITMAN WILLIAMS and MARCELLE KREISCHER,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MOTION OF THE INSTITUTE OF SHORTENING AND EDIBLE OILS, INC. FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE

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The Institute of Shortening and Edible Oils, Inc. (Institute) respectfully moves the Court pursuant to Rule 42 of its Revised Rules for leave to file a brief

as amicus curiae.* Attorneys for the petitioner have consented to the filing of such a brief, but the attorneys for the respondents have refused to consent.

The Institute is a nonprofit membership corporation organized and existing under the laws of Louisiana. Its membership consists of companies which produce in excess of 90 percent of the food shortenings and edible oils manufactured in the United States. The petitioner in this proceeding is a member of the Institute.

Like petitioner, many of the other members of the Institute are engaged in multi-plant operations in different cities and states. Collective bargaining agreements in effect at various plants of the members of the Institute are similar to the collective bargaining agreement involved in this case—that is, they expressly relate to a single plant and contain no provision for the transferral of seniority rights to other plants of the company.

Because of this, the Institute is vitally interested in the issues involved in the instant case. If the decision of the lower court remains in effect, the members of the Institute who are parties to such collective bargaining agreements may be seriously hindered, if not blocked, from discontinuing uneconomical operations

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* Pursuant to Rule 33 2(b), we note that this proceeding involves a question as to the constitutionality of the Act of July 28, 1953, 67 Stat. 226, Title 28 U.S.C. Section 171, an Act of Congress affecting the public interest. Neither the United States nor any agency, officer or employee thereof is a party to this proceeding. Title 28 U.S.C. Section 2403 may, therefore, be applicable. No court of the United States, as defined by Title 28 U.S.C. Section 451 has, pursuant to Title 28 U.S.C. Section 2403, certified to the Attorney General the fact that the constitutionality of such act of Congress has been drawn in question.

or from transferring such operations to more efficient plants. Moreover, the decision of the lower court confronts the members of the Institute, and presumably all other employers as well, with the question of whether and to what extent an employer may, under the Labor Management Relations Act of 1947, as amended, lawfully negotiate with a union representing employees in one of his plants with respect to terms and conditions of employment which will be applicable in another plant in which no union or a different union has been selected as the bargaining representative.

In view of footnote 1 on page 5 of the petition for certiorari, it appears that petitioner does not intend to direct the Court's attention to this important issue. In that footnote, petitioner merely suggests that an express agreement between it and the union conferring on its employees the seniority rights which were implied by the Court of Appeals "might well have constituted an unfair labor practice. Title 29 U.S.C., § 157, 158(a), (1), (5), ..." Although petitioner thus touches superficially the issue of possible conflict between the Court of Appeals' decision and the provisions of the Labor Management Relations Act of 1947, as amended, petitioner stops short of reaching the core of the issue.

Assuming *arguendo* that the Court of Appeals' interpretation of the collective bargaining agreement was not in error,* the basic question is whether such

* As to this issue, the Institute believes that petitioner's position is entirely correct and will be adequately presented by petitioner. It is unthinkable that parties could reasonably have intended to incorporate in a collective bargaining agreement seniority rights of such far-reaching effect in the absence of express language so providing and in the face of provisions which plainly negative any such intention.

an agreement is *per se* in violation of Sections 7 and 9(a)* of the Labor Management Relations Act of 1947, as amended, which authorize a union to bargain only with respect to the appropriate unit represented by it. If such an agreement is unlawful, it follows that it is unenforceable. The question of illegality arises because the Court of Appeals' decision, in effect, clothes a union with authority to negotiate with respect to a bargaining unit which it does not then and may never have statutory authority to represent. Specifically, the Court of Appeals has held that there was an implied agreement between petitioner and the union that petitioner's employees at the Elmhurst Plant were to have preferential seniority rights with respect to hire and tenure of employment at petitioner's newly established Bethlehem Plant.

By so construing the agreement, the Court of Appeals has, in effect, given its approval to bargaining by a union with respect to a collective bargaining unit (the new Bethlehem Plant) not represented by the union. Prior to the decision below, it was beyond question that a union could not negotiate with respect to the status of employees who were not within the

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* "Sec. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities . . .."

"Sec. 9 (a) Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees *in such unit* for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment . . .." (Emphasis added.)

bargaining unit represented by it. Yet, the seniority provision which the court has read into the agreement *is meaningful only in terms of a bargaining unit other than that represented by the union and is applicable only at a time when the employees affected are no longer employed in the bargaining unit represented by the union.* Thus it seems plain that the union's authority to negotiate has, for all practical purposes, been extended beyond the statutory limits, and the decision below must, therefore, be reversed.

Wherefore, the Institute prays for leave to file a brief as amicus curiae addressed to the issue set forth above.

Dated July 27, 1961.

Respectfully submitted,

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